

2214071 (Migration) [2023] AATA 1926 (25 May 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REPRESENTATIVE:	Mr James Chung
CASE NUMBER:	2214071
MEMBER:	SM Michael Cooke
DATE:	25 May 2023
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal sets aside the decision under review and substitutes a decision not to cancel the applicant's Subclass 801 (Spouse) visa.

Statement made on 25 May 2023 at 2:16pm

CATCHWORDS

MIGRATION – cancellation – Partner (Residence) (Class BS) visa – Subclass 801 (Spouse) – change in circumstances before visa granted not notified – date of end of relationship – sponsor informed department of date before visa granted, applicant informed of date after – sponsor's new partner pregnant – applicant unaware of sponsor's infidelity until after visa granted and continued living in matrimonial home – formal separation when applicant left home – incorrect date given in divorce application – no notification required after visa granted – decision under review set aside

LEGISLATION

Migration Act 1958 (Cth), ss 99, 104, 107, 109(1), 359A

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to cancel the applicant's Subclass 801 (Spouse) visa under s 109(1) of the *Migration Act 1958* (Cth) (the Act).
2. The delegate cancelled the visa on the basis that the applicant did not notify the Department of a change in her circumstances. The issue in the present case is whether that ground for cancellation is made out, and if so, whether the visa should be cancelled.
3. The applicant appeared before the Tribunal on 24 January 2023 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
4. The applicant was represented in relation to the review and attended the hearing.
5. On 5 May 2023 the Tribunal issued an Invitation pursuant to s.359A.

6. INVITATION TO COMMENT ON OR RESPOND TO INFORMATION – [THE APPLICANT]

7. I am writing on instruction from the Member conducting your review, in relation to the application for review made by you in respect of a decision to cancel your Subclass 801 (Spouse) visa.

8. In conducting the review, we are required by the Migration Act 1958 to invite you to comment on or respond to certain information which we consider would, subject to your comments or response, be the reason, or a part of the reason, for affirming the decision under review.

9. Please note, however, that we have not made up our mind about the information.

10. The particulars of the information are:

11. Adverse information sourced from Departmental information concerning your former spouse and his present de facto partner indicates the following:

- You asserted that your Spouse relationship with [Mr A] ended in December 2020/1 and formally on 1 February 2021.
- Your former sponsor informed the Department separately that he met his now de facto partner on 01 Jul 2016 and committed to a de facto relationship with her on 15 Nov 2020.
- He further informed the Department that as at 15 November 2020 she was 'currently 4 months pregnant with the sponsor'.

12. This information is relevant to the review because it may indicate that your claims that you were in a genuine and continuing spouse relationship with your former sponsoring spouse up until December 2020 were not true. This may also suggest that you are not a witness of truth and that assertions you have made concerning the date of

the end of your Spouse relationship in your post-hearing submission to the Tribunal are false.

13. The further relevance of this information is that it may indicate that you did not inform the Department of 'a change in circumstances' pursuant to s.104 of the Act prior to the grant of your Partner Subclass 801 visa.

14. Relevantly this may support a finding that the delegate's decision to cancel your Subclass 801 visa should be affirmed.

15. You are invited to give comments on or respond to the above information in writing.

16. The applicant through her representative responded to the Invitation as follows:

17. 1. We refer to the invitation to comment dated 5 May 2023.

18. 2. We provide further evidence to support the claims made by the Applicant and resubmit that the events which have been provided by the Applicant are true and correct.

19. 3. The evidence provided are:

20. a. Statutory declaration from the Applicant;

21. b. Correspondence from Medibank dated September 2020 addressed to the Applicant at [Address] (Matrimonial Home);

22. c. Medicare letter dated 14 December 2020;

23. d. Letter to my Payroll Officer dated 3 February 2021;

24. e. Letter from Commbank dated 4 February 2021;

25. f. Letter from Westpac dated 11 May 2022;

26. g. Letter from Commbank dated 13 May 2022;

27. h. Letter from National Cervical Screening Program dated 19 October 2022;
and

28. i. Letter from Westpac dated 19 January 2023.

29. 4. The further evidence provided is an indication that the Applicant continued to reside with the Sponsor's parents at the Matrimonial Home even after the relationship had broken down.

30. 5. This further substantiates that the Sponsor and the Applicant were still residing together at the Sponsor's parents' house up until February 2021, when the Applicant then founds alternative housing arrangements.

31. 6. As submitted at the hearing, we reiterate that the breakdown of the relationship ended towards the end of December 2020 upon the Applicant finding messages from their close friend, which is now the Sponsors partner.

32. 7. We further understand that there is a partner visa application on foot between the Sponsor and [Ms B] which may have contrasting information as to the date the Sponsor had begun his relationship with [Ms B] and the date the relationship ended with the Applicant.

33. 8. As submitted at the Hearing, we noted that this could possibly be the date the Sponsor had begun his infidelity.

34. 9. Notwithstanding this, we assume there is no mention of infidelity by the Sponsor in the current visa application with [Ms B], which would also raise concerns to Department on the authenticity of the version of events provided by the Sponsor.

35. **Evidence at the Hearing**

36. 10. At the hearing, the Applicant gave verbal evidence to the Tribunal regarding the events which occurred. Namely:

37. a. the history of the relationship;

38. b. the events which occurred leading up to the relationship breakdown towards the end of December 2020;

39. c. her movements since the relationship breakdown;

40. d. an explanation as to the correct date on the Divorce Application with supporting evidence provided by our office confirming the incorrect date of the separation in the Divorce Application; and

41. e. reasons why the Department of Home Affairs (Department) was not informed once the relationship broke down.

42. 11. A matter of some complexity concerns when the Sponsor and Applicant's relationship ended as there appears to be adverse information provided by the Sponsor. Namely whether the date the relationship ended was prior or after the date of the Applicant's subclass 801 visa grant.

43. 12. Submissions were made at the hearing noting that it is impossible for the Applicant to inform the Department of the relationship breakdown if the Applicant had not known of the Sponsor's infidelity which did not come to light until late December 2020 after her visa was granted.

44. 13. Pursuant to section 104 of the Migration Act 1958 (Act) requires either party of a relationship to inform the Department of any changes in circumstances that occurred prior to a visa being granted.

45. 14. However, no notification is required after a visa is granted. This is further substantiated in the Form 1022 where it states:

46. "You do not have to notify the Department of any changes in your circumstances that occurred:

- After you were granted your visa (if you applied for your visa in Australia); or
- After you have been immigration cleared (if you applied for your visa outside Australia)."

47. 15. Therefore, there is no breach of section 104 of the Act provided that the visa was granted on or about 11 December 2020 and the date the Applicant came to know of the Sponsors actions was the end of December 2020 which caused the relationship to breakdown. Provided that there is no breach of section 104 of the Act, we submit that her visa should not have been cancelled on this basis.

48. 16. Further evidence was provided by our office noting the incorrect date for separation as provided on the divorce application where the Department advised that the document was an authentic and verifiable document.

49. 17. The evidence provided relates to the events which occurred leading to the incorrect date and the correspondences between our office and the Applicant leading up to lodging the application for divorce.

50. 18. There is also evidence from the Sponsor's current partner confirming the date of separation occurred after the date the Applicant received her visa grant.

51. 19. We further provided evidence of our attempts to have the date amended, however, the Court confirmed that the case was closed and could not be reopened to be amended.

52. 20. In the instance that the correct date for the separation was inserted in, noting that this was after the 801- visa grant, the Department would acknowledge that it is an authentic and verifiable document, and would place considerable weight on this consideration before coming to a decision to cancel the Applicant's visa.

53. 21. Factoring in the evidence provided by the Sponsor's current partner, correspondence from our office between the Applicant and evidence at the Tribunal, should suggest that the relationship ended after the 801 visa grant.

54. **Adverse information**

55. 22. As we understand, there is information provided by the Sponsor to the Department of his current relationship with his partner, [Ms B]. In particular, the date he had first met [Ms B] and the commencement of their relationship.

56. 23. As noted in the Applicant's previous statutory declaration, the Applicant, Sponsor and [Ms B] were friends for quite some time, hence, the Applicant finds that their initial meeting date as provided as 1 July 2016 is plausible, although nothing had eventuated apart from a friendship until the infidelity begun.

57. 24. The Tribunal will also note that the marriage certificate was signed by the Applicant and Sponsor on 21 February 2016, and the relationship was genuine and continuing until the Applicant discovered the faithlessness by the Sponsor.

58. 25. Despite the Sponsor alleging that his de facto relationship started on 15 November 2020, what is assumed is the date the infidelity had begun, and unknown to the Applicant, and perhaps even earlier given the findings by the Tribunal that she was 4 months pregnant, we submit that the Applicant could not have foreseen and confirm the date the relationship ended until she discovered messages from [Ms B] on the Sponsors phone.

59. 26. Notwithstanding the above, we also find that it is highly unlikely that the Sponsor would self-impeach himself of his infidelity and would rather provide a

version of events more favourably to his situation and clearly, at a disadvantage to the Applicant.

60. 27. We trust the Tribunal will factor in all evidence prior to coming to a decision, in particular the verbal evidence at the Tribunal and all written evidence provided by the Applicant and our office.

61. 28. Should you require any further information, please do not hesitate to contact our office.

62. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be **set aside**.

CONSIDERATION OF CLAIMS AND EVIDENCE

63. Section 109(1) of the Act allows the Minister to cancel a visa if the visa holder has failed to comply with ss 101, 102, 103, 104, 105 or 107(2) of the Act. Broadly speaking, these sections require non-citizens to provide correct information in their visa applications and passenger cards, not to provide bogus documents and to notify the Department of any incorrect information of which they become aware and of any relevant changes in circumstances.
64. The exercise of the cancellation power under s 109 of the Act is conditional on the Minister issuing a valid notice to the visa holder under s 107 of the Act, providing particulars of the alleged non-compliance. Where a notice is issued that does not comply with the requirements in s 107, the power to cancel the visa does not arise. Extracts of the Act relevant to this case are attached to this decision.
65. In the present matter, the Tribunal is satisfied that the delegate had reached the necessary state of mind to engage s 107 and that the notice issued under s 107 complied with the statutory requirements.

Was there non-compliance as described in the s 107 notice?

66. The issue before the Tribunal is whether there was non-compliance in the way described in the s 107 notice, being the manner particularised in the notice, and if so, whether the visa should be cancelled. The non-compliance identified and particularised in the s 107 notice was non-compliance with s.104 in the following respects:

- the applicant failed to notify the Department in writing that her relationship with her sponsor partner, [Mr A], had ended on 24 October 2020 and that she was no longer in a genuine and continuing relationship with her sponsor prior to the grant of her Partner visa on 11 December 2020. This appeared to be a contravention of section 104 of the Act.

67. Findings as to whether there was relevant non-compliance

68. The applicant in a submission from her representative has said the following:
- On 16 March 2016, the Applicant applied for a combined partner (subclass 801/820) visa with the Sponsor as the sponsoring partner.
 - On 11 December 2020, the Applicant was granted both 801 and 820 visas (Visas) on the basis that the couple were still in a genuine and continuing relationship with the Sponsor.

- On 9 February 2021, the Department was notified that the relationship had ended on 24 October 2020, prior to the grant of the Visas.
- No information was received by the Department of the alleged change in circumstances and the Department notified the Applicant of cancellation of her visa due to non-compliance pursuant to Section 104 of the Migration Act 1958 (Act).
- Subsequently, on 21 September 2022, the Applicant's visa was cancelled by the Delegate using their discretion under section 109 of the Act.
- The Applicant and Sponsor first met in April 2015 and their relationship began shortly after.
- The Applicant and Sponsor were residing with the Sponsor's parents at [Address] (Matrimonial Home).
- We submit that the Applicant and Sponsor were in a relationship up until the end of December 2020 before the Applicant had discovered messages on his phone from a close friend, [Ms B].
- It is submitted that the messages were to the effect of [Ms B] missing the Sponsor and how she feels empty without him by her side.
- Upon the Applicant confronting the Sponsor and [Ms B], she discovered that the Sponsor and [Ms B] were seeing each other behind the Applicant's back.
- At the time of the relationship breakdown, the Applicant submits that she had nowhere to go, nor could she afford to move out at the time. However, the Sponsor advised her to stay at the Matrimonial Home until she was comfortable enough to move out.
- On 1 February 2021, the Applicant moved out of the matrimonial home, and this was agreed between the Applicant and Sponsor that this was the official date of separation.
- We note that section 104 of the Act provides that the Minister must be notified of any change of circumstances after lodgement of a visa application as soon as possible, otherwise any visas so granted may be subject to cancellation.
- The Delegate has advised that information was received noting that the relationship between the Applicant and Sponsor had ceased in October 2020 prior to the grant of the Visas.
- As instructed by the Applicant and Sponsor, we submit that the relationship had officially ended on 1 February 2021, when the Applicant had moved out of the Matrimonial home.
- Provided that the separation date is after the grant of the Visas, it is our understanding that there is no requirement to notify the Minister of the change in circumstance.
- An application for divorce was prepared by our office, however, we note that the incorrect separation date was inserted for the purpose of preparing the application, to be changed thereafter come the time when the divorce application was to be lodged.

- We refer the Member to the statutory declaration of James Chung providing the correspondences leading up to the divorce, and furthermore, the significant error made by our office in regard to the separation date.

69. Application for Divorce

- On 30 September 2021, we were contacted by the Applicant regarding a joint application for divorce proceedings. We advised the Applicant that she has been separated for less than a year, and that she may need to wait until the beginning of 2022 to start the divorce application. Our standard questionnaire was sent to the Applicant and Sponsor to complete.
- On or about 26 January 2022, we received our joint questionnaire returned from the Applicant and Sponsor. Enclosed to this email, the Applicant had forwarded the responses from [Ms B] noting the date of separation as 2 January 2021, however, the Applicant submits that this was a typo on her end.
- We prepared a draft application for divorce, noting the incorrect separation date as 1 October 2020, when this date should have been noted as 1 February 2021 as provided by the Applicant and Sponsor in reply to our divorce questionnaire. We had inserted in a date closest to when she originally contacted our office.
- We submit that an application for divorce cannot be prepared when the separation date is less than a year. Hence, the reason for the incorrect date inserted in by our office.
- On 27 January 2022, we received a text message from the Applicant advising that the separation date was incorrect, in which our response was that this will be changed, however, we require to wait a few days so the separation date would be a year from separation.
- Unfortunately, this was not done and on 7 February 2022, we proceeded to lodge the application for divorce with the incorrect separation date.
- Our office went through the normal processes of notifying the Applicant of the divorce proceedings, however, did not receive any correspondence from the Applicant.
- We submit that it was not until this was brought to our attention by the Applicant when she received a notice of her visa cancellation that we realised an error had been made.
- On 22 September 2022, our office contacted the Family Court to request for this to be amended, however, received notification that as the matter has been closed and finalised, that this could not be reopen(ed).
- Despite an explanation provided to the Delegate, the Delegate has noted that there is no date attached to the divorce questionnaire and furthermore that the evidence provided is unconvincing.
- We are unsure what information the Department has received regarding the date the relationship ended, however, we submit the correct separation date is 2 February 2021 as provided by the Sponsor and Applicant.

Conclusion on non-compliance

70. Section 104 – Changes in circumstances to be notified

71. (1) If circumstances change so that an answer to a question on a non-citizen's application form or an answer under this section is incorrect in new circumstances, he or she must, as soon as practicable, inform an officer in writing of the new circumstances and of the correct answer in them,

72. (2) If the applicant is in Australia at the time the visa is granted, subsection (1) only applies to changes in circumstances before the visa is granted.

73. (3) If the applicant is outside Australia at the time the visa is granted, subsection (1) only applies to changes in circumstances after the application and before the applicant is immigration cleared.

74. (4) Subsection (1) applies despite the grant of any visa.

75. By operation of s99 of the Migration Act 1958, any information that a non-citizen gives or provides, causes to be given or provided, or that is given or provided on his or her behalf, to the Minister, an officer, an authorised system, a person or the Tribunal, or the Immigration Assessment Authority, reviewing a decision under this Act in relation to the non-citizen's application for a visa is taken for the purposes of section 100, paragraphs 101(b) and 102(b) and sections 104 and 105 to be an answer to a question in the non-citizen's application form, whether the information is given or provided orally or in writing and whether at an interview or otherwise.
76. The Tribunal has extensively investigated the case from available information. The Tribunal acknowledges there is an element of "he (the former sponsoring spouse) said versus she (the applicant) said". However, the Tribunal prefers the applicant's version based on the evidence she has presented both at the hearing and subsequently. Her version of events seems to the Tribunal to be the more plausible one.
77. The decision to cancel the applicants' visa was based on a claim that the applicant failed to notify the Department in writing that her relationship with her sponsor partner, [Mr A], had ended on 24 October 2020 and that she was no longer in a genuine and continuing relationship with her sponsor prior to the grant of her Partner visa on 11 December 2020.
78. The Tribunal does not agree with this finding by the delegate. It is satisfied that the applicant was unaware of her true marital situation until after the grant of her permanent resident visa in December 2020. The fact that she continued living with the sponsor and his parents from 2016 until January 2021 reinforces this finding. Thus, it is the Tribunal's view that she is not captured by the notification stipulation found in s.104 of the Act and the grant was made prior to the revelation of her sponsor's extra-marital relationship.
79. For these reasons, the Tribunal finds that there was no non-compliance with s 104 by the applicant in the way described in the s 107 notice.
80. As the Tribunal is not satisfied that there was non-compliance by the applicant in the way described in the notice given under s 107 of the Act, it follows that the discretionary power to cancel the applicant's visa does not arise.

DECISION

81. The Tribunal sets aside the decision under review and substitutes a decision not to cancel the applicant's Subclass 801 (Spouse) visa.

Michael Cooke
Senior Member

ATTACHMENT – *Migration Act 1958* (extracts)

5 Interpretation

- (1) In this Act, unless the contrary intention appears:
- bogus document**, in relation to a person, means a document that the Minister reasonably suspects is a document that:
- (a) purports to have been, but was not, issued in respect of the person; or
 - (b) is counterfeit or has been altered by a person who does not have authority to do so; or
 - (c) was obtained because of a false or misleading statement, whether or not made knowingly.

97 Interpretation

In this Subdivision:

application form, in relation to a non-citizen, means a form on which a non-citizen applies for a visa, being a form that regulations made for the purposes of section 46 allow to be used for making the application.

passenger card has the meaning given by subsection 506(2) and, for the purposes of section 115, includes any document provided for by regulations under paragraph 504(1)(c).

Note: **Bogus document** is defined in subsection 5(1).

98 Completion of visa application

A non-citizen who does not fill in his or her application form or passenger card is taken to do so if he or she causes it to be filled in or if it is otherwise filled in on his or her behalf.

99 Information is answer

Any information that a non-citizen gives or provides, causes to be given or provided, or that is given or provided on his or her behalf, to the Minister, an officer, an authorised system, a person or the Tribunal, or the Immigration Assessment authority, reviewing a decision under this Act in relation to the non-citizen's application for a visa is taken for the purposes of section 100, paragraphs 101(b) and 102(b) and sections 104 and 105 to be an answer to a question in the non-citizen's application form, whether the information is given or provided orally or in writing and whether at an interview or otherwise.

100 Incorrect answers

For the purposes of this Subdivision, an answer to a question is incorrect even though the person who gave or provided the answer, or caused the answer to be given or provided, did not know that it was incorrect.

104 Changes in circumstances to be notified

- (1) If circumstances change so that an answer to a question on a non-citizen's application form or an answer under this section is incorrect in the new circumstances, he or she must, as soon as practicable, inform an officer in writing of the new circumstances and of the correct answer in them.
- (2) If the applicant is in Australia at the time the visa is granted, subsection (1) only applies to changes in circumstance before the visa is granted.
- (3) If the applicant is outside Australia at the time the visa is granted, subsection (1) only applies to changes in circumstances after the application and before the applicant is immigration cleared.
- (4) Subsection (1) applies despite the grant of any visa.

107 Notice of incorrect applications

- (1) If the Minister considers that the holder of a visa who has been immigration cleared (whether or not because of that visa) did not comply with section 101, 102, 103, 104 or 105 or with subsection (2) in a response to a notice under this section, the Minister may give the holder a notice:
 - (a) giving particulars of the possible non-compliance; and
 - (b) stating that, within a period stated in the notice as mentioned in subsection (1A), the holder may give the Minister a written response to the notice that:
 - (i) if the holder disputes that there was non-compliance:
 - (A) shows that there was compliance; and
 - (B) in case the Minister decides under section 108 that, in spite of the statement under sub-subparagraph (A), there was non-compliance—shows cause why the visa should not be cancelled; or

- (ii) if the holder accepts that there was non-compliance:
 - (A) give reasons for the non-compliance; and
 - (B) shows cause why the visa should not be cancelled; and
- (c) stating that the Minister will consider cancelling the visa:
 - (i) if the holder gives the Minister oral or written notice, within the period stated as mentioned in subsection (1A), that he or she will not give a written response—when that notice is given; or
 - (ii) if the holder gives the Minister a written response within that period—when the response is given; or
 - (iii) otherwise—at the end of that period; and
- (d) setting out the effect of sections 108, 109, 111 and 112; and
- (e) informing the holder that the holder's obligations under section 104 or 105 are not affected by the notice under this section; and
- (f) requiring the holder:
 - (i) to tell the Minister the address at which the holder is living; and
 - (ii) if the holder changes that address before the Minister notifies the holder of the Minister's decision on whether there was non-compliance by the holder—to tell the Minister the changed address.
- (1A) The period to be stated in the notice under subsection (1) must be:
 - (a) in respect of the holder of a temporary visa—the period prescribed by the regulations or, if no period is prescribed, a reasonable period; or
 - (b) otherwise—14 days.
- (1B) Regulations prescribing a period for the purposes of paragraph (1A)(a) may prescribe different periods and state when a particular period is to apply, which, without limiting the generality of the power, may be to:
 - (a) visas of a stated class; or
 - (b) visa holders in stated circumstances; or
 - (c) visa holders in a stated class of people (who may be visa holders in a particular place); or
 - (d) visa holders in a stated class of people (who may be visa holders in a particular place) in stated circumstances.
- (2) If the visa holder responds to the notice, he or she must do so without making any incorrect statement.

108 Decision about non-compliance

The Minister is to:

- (a) consider any response given by a visa holder in the way required by paragraph 107(1)(b); and
- (b) decide whether there was non-compliance by the visa holder in the way described in the notice.

109 Cancellation of visa if information incorrect

- (1) The Minister, after:
 - (a) deciding under section 108 that there was non-compliance by the holder of a visa; and
 - (b) considering any response to the notice about the non-compliance given in a way required by paragraph 107(1)(b); and
 - (c) having regard to any prescribed circumstances;
 may cancel the visa.
- (2) If the Minister may cancel a visa under subsection (1), the Minister must do so if there exist circumstances declared by the regulations to be circumstances in which a visa must be cancelled.